

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARKAN HAMANA,
v.
SAM KHOLI, et al.

Defendant.

Case No. 10cv1630 BTM (BGS)

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff Arkan Hamana has filed a motion for a temporary restraining order ("TRO") [Doc. 3] seeking to enjoin Defendants from continuing foreclosure proceedings on his property. For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

Plaintiff has sued Defendants for usury and a civil violation of the Racketeering Influenced and Corrupt Organizations Act (“RICO”), among several other claims.¹ At the center of the allegations are a series of loans Defendants Sam Kholi and Kholi Enterprises, Inc. allegedly made to Plaintiff. In total, Plaintiff claims Kholi loaned him \$1 million in three separate loans. One of the loans was secured by two pieces of Plaintiff’s property, his home

¹ Plaintiff has sued four defendants. Only Sam Kholi and Sam Kholi Enterprises, Inc., however, are relevant to this motion because they purportedly issued the notices of default and election to sell. The Court therefore only discusses the allegations related to those Defendants.

1 at 2953 Via Roblar Court, El Cajon, CA 921019 and his commercial property at 3276 Monroe
 2 Avenue, San Diego, CA 92116. On May 20, 2010, Action Foreclosure Services, on behalf
 3 of Kholi Enterprises, recorded on both properties a notice of default and election to sell.
 4 Plaintiff wants to enjoin the foreclosure process.

5 In October 2007, Plaintiff alleges he borrowed \$400,000² from Kholi through Kholi
 6 Enterprises. On the face of the note, the loan had a one-year term and Plaintiff was to pay
 7 10 percent interest each year. But according to Plaintiff, they orally agreed to a higher rate
 8 of 16.8 percent. Kholi also allegedly charged Plaintiff origination fees totaling \$50,000. This
 9 note was secured by Plaintiff's two properties, his home and his business. Plaintiff alleges
 10 he was induced into entering this loan by Kholi's false representation that, contrary to the
 11 one-year term on the face of the note, the loan would not mature as long as Plaintiff
 12 continued to make monthly interest payments.

13 Plaintiff allegedly borrowed more money from Kholi in January 2009. He claims he
 14 borrowed another \$400,000. This time, though, Plaintiff claims the loan was not evidenced
 15 by a promissory note, and the rate they agreed to was 16.8 percent per year. Plaintiff
 16 allegedly paid an origination fee of \$80,000 for the second loan.

17 The very next month, February 2009, Plaintiff says he borrowed from Kholi yet again.
 18 This time he allegedly borrowed \$200,000. Like with the second loan, they did not execute
 19 a written note. And again, Plaintiff claims the interest rate was 16.8 percent per year.

20 Plaintiff claims that he made payments on these three loans from their execution until
 21 May of 2010. But after an argument between Kholi and Plaintiff, Plaintiff claims Kholi then
 22 called the loans due. And on May 20, 2010, Kholi Enterprises caused notices of default and
 23 election to sell to be recorded against both properties.

25 II. LEGAL STANDARD

26 To prevail on a motion for a temporary restraining order, the moving party must

28 ² The \$400,000 was paid in two installments, one for \$300,000 in October 2007 and another for \$100,000 in January 2008.

1 establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable
 2 harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4)
 3 an injunction is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, __ U.S.
 4 __, 129 S. Ct. 365, 374 (2008).

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6 III. DISCUSSION

7 At the outset, the Court notes that Plaintiff cites to the wrong standard for a temporary
 8 restraining order. Plaintiff cites to cases saying that “the greater the relative hardship to the
 9 moving party, the less probability of success must be shown.” *Sun Microsystems, Inc. v.*
 10 *Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999)). Although this used to be Ninth Circuit
 11 precedent, the Supreme Court rejected this test in favor of the one set forth in the preceding
 12 section. No matter how much harm Plaintiff might suffer, he must still show that he is likely
 13 to succeed on the merits. See *Winter*, 129 S. Ct. at 374.

14 Plaintiff does little to meet his burden. He does not recite the elements of any of his
 15 sixteen claims and show how his evidence proves those elements. He says that he “has
 16 submitted sufficient evidence that there is a strong likelihood that he will succeed at trial,” and
 17 then mentions that he submitted his own declaration and the declaration of five other people
 18 “to whom KHOLI through KHOLI ENTERPRISES made similar usurious loans to.” (Pl.’s Br.
 19 at 12.) But he does not cite to any specific paragraphs of the declarations or explain why
 20 they support his claims. The Court could deny his motion on this ground alone.

21 Still, the Court has reviewed the evidence supporting the two claims Plaintiff mentions
 22 as having a likelihood of success on the merits: the RICO claim and the usury claim. The
 23 Court discusses its analysis below.

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25 1. A Civil RICO Claim Cannot Be the Basis for Injunctive Relief

26 The Court cannot issue injunctive relief based on a civil RICO claim. *Religious Tech.*
 27 *Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986) (reversing district court’s issuance
 28 of preliminary injunction because “injunctive relief is not available to a private plaintiff in a civil

1 RICO action"). Plaintiff's RICO claim therefore cannot be the basis for a temporary
 2 restraining order or preliminary injunction.

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4 **2. Plaintiff's Usury Claim**

5 The California Constitution limits the interest rate than can be charged on certain
 6 types of loans. See Cal. Const. art. XV, § 1(1), (2). Parties may contract for a commercial
 7 loan at a rate up to the greater of ten percent, or five percent over the prime lending rate.
 8 See *id.* "The attempt to exact the usurious rate of interest renders the interest provisions of
 9 a note void. The usurious provisions, however, do not affect the right of the payee to recover
 10 the principal amount of the note when due." *Epstein v. Frank*, 125 Cal. App. 3d 111, 122
 11 (1981) (citations omitted). A borrower therefore is still obligated to repay the principal on a
 12 note even if it has a usurious interest rate. *Id.* Any usurious interest paid, however, may be
 13 subject to treble damages. Cal. Civ. Code § 1916-3(a).

14 Here, assuming Plaintiff's allegations are true, the loans at issue may have usurious
 15 interest rates because, in effect, the rates exceed 10 percent.³ But even if that were true,
 16 Plaintiff would only be able to get treble damages for any interest he paid in excess of the
 17 allowed rate.⁴ He would still be obligated to pay back any principal he owes after taking
 18 credit for the payments he has already made. See *Weiss v. Brandt*, 137 Cal. App. 2d 710,
 19 718–19 (1956). Moreover, the usurious interest rate alone would not be enough to cancel
 20 the deed of trust which secures the note. See *Campbell v. Realty Title Co.*, 20 Cal.2d 195
 21 (1942); *West Coast Builders v. Pac. States Auxiliary Corp.*, 129 Cal. App. 112, 113 (1933)
 22 (the usurious interest rate on the note, "however, does not affect the validity of the note as
 23 to the principal sum to secure which the trust deed was executed"); *Finley v. Wyatt*, 113 Cal.

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 25 ³ The Court does not find that the loans have a usurious interest rate, but only
 assumes that Plaintiff can prove this for purposes of this motion.

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 27 ⁴ The statute of limitations for treble damages based on a usurious interest rate is one
 28 year from the date which the plaintiff paid the usurious interest. See Cal. Civ. Code § 1916-
 3(a). If a plaintiff sues after the one-year period, a court will reform the contract so that
 payments that would have been attributed to interest under the original agreement are
 instead credited toward principal until the principal is repaid. *Weiss v. Brandt*, 137 Cal. App.
 2d 710, 718–19 (1956).

1 App. 233, 236 (1931). So even if Plaintiff can succeed in proving that the loans have
2 usurious interest rates, he may still be in default on the loans, and Defendants would still
3 have the right to foreclose on the properties. Plaintiff has not presented evidence proving
4 that, absent the allegedly usurious interest rates, he would not still be in default.

5 For these reasons, Plaintiff has failed to show that even if he did succeed in showing
6 that the loans have usurious interest rates, he would be entitled to terminate the foreclosure
7 proceedings.

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9 **3. Fraud in the Inducement**

10 Although Plaintiff does not mention his fraud-in-the-inducement claim in his motion,
11 the Court addresses it here because it may be a basis for rescinding the notes and the deed
12 of trust. But in order to seek rescission, a plaintiff must restore or offer to restore everything
13 he has received as consideration under the contract. Cal. Civ. Code § 1691(b). Here,
14 Plaintiff has made no effort to show he is capable of doing so. Therefore, he has failed to
15 prove he is likely to succeed on the merits of his rescission claim.

16 Because Plaintiff has failed to show a likelihood of success on his relevant claims, the
17 Court needs not address the remaining elements for issuing a temporary restraining order.

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19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court **DENIES** Plaintiff's request for a temporary
21 restraining order [Doc. 3]. The Court **OVERRULES** Defendants' evidentiary objections as
22 moot.

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1 Plaintiff has also asked for an order to show cause why a preliminary injunction should
2 not issue. The Court issues the following shortened briefing schedule on the preliminary
3 injunction; Plaintiff's brief is due **September 3, 2010**. Defendants' opposition is due
4 **September 13, 2010**. And Plaintiff's reply is due **September 16, 2010**. The Court will issue
5 a separate order setting a hearing date shortly thereafter.

6 **IT IS SO ORDERED.**

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8 DATED: August 19, 2010

Barry Ted Moskowitz

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10 Honorable Barry Ted Moskowitz
11 United States District Judge
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